

1990

Thelma Johnson v. The Utah State Retirement Office/The Utah State Retirement Board : Brief in Opposition to Certiorari

Utah Supreme Court

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Aaron F. Jepson; Attorney for plaintiff-appellant.

Mark A. Madsen, Jeffrey R. Oritt; Tibbals, Howell, Wilkins and Oritt; attorneys for defendant-respondent.

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BRIEF

900142

IN THE SUPREME COURT OF THE STATE OF UTAH

THELMA JOHNSON,	:	
	:	New Supreme Court No. 900142
Plaintiff-Appellant,	:	
	:	Original Supreme Court
vs.	:	No. 870485
	:	
THE UTAH STATE RETIREMENT	:	Court of Appeals No.
OFFICE/THE UTAH STATE	:	880511-CA
RETIREMENT BOARD, an	:	
independent agency of the	:	(No priority for oral
State of Utah, GEM STATE	:	argument under Rule
MUTUAL OF UTAH, a Utah	:	51, URAP)
corporation,	:	
	:	
Defendants-Respondents.	:	

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Appeal from Utah Court of Appeals affirmation of Judgment of the Third District Court granting summary judgment in favor of Defendants-Respondents, Utah State Retirement Board and Gem State Mutual of Utah, and denying summary judgment in favor of Thelma Johnson, Honorable Homer F. Wilkinson presiding.

JEFFREY R. ORITT, ESQ.
TIBBALS, HOWELL, WILKINS & ORITT
257 East 200 South-2, Suite 850
Salt Lake City, Utah 84111
Attorney for Defendant-Respondent
Gem State Mutual of Utah

MARK A. MADSEN, ESQ.
540 East 200 South
Salt Lake City, Utah 84102
Attorney for Defendant-Respondent
Utah State Retirement Board

ARRON F. JEPSON, ESQ.
Suite 608, Judge Building
8 East 300 South
Salt Lake City, Utah 84111
Attorney for Plaintiff-Appellant

FILED

MAY 7 1990

Clerk, Supreme Court, Utah

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JEFFREY R. ORITT, ESQ.
TIBBALS, HOWELL, WILKINS & ORITT
257 East 200 South-2, Suite 850
Salt Lake City, Utah 84111
Attorney for Defendant-Respondent
Gem State Mutual of Utah

MARK A. MADSEN, ESQ.
540 East 200 South
Salt Lake City, Utah 84102
Attorney for Defendant-Respondent
Utah State Retirement Board

ARRON F. JEPSON, ESQ.
Suite 608, Judge Building
8 East 300 South
Salt Lake City, Utah 84111
Attorney for Plaintiff-Appellant

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BRIEF IN OPPOSITION TO
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OBJECTION TO PLAINTIFF'S STATEMENT OF
QUESTIONS PRESENTED FOR REVIEW.

1. Plaintiff's first question presented on appeal, whether on July 5, 1978 there existed a valid enforceable group life insurance contract on the life of Plaintiff's decedent, Douglas Johnson, is confusing in the context of the undisputed facts of this case. As noted by the Utah Court of Appeals in their August 29, 1989 opinion affirming the Lower Court's grant of summary judgment to the Defendants-Respondents, Mr. Johnson was at the time of his death insured under a group life insurance policy underwritten by Ideal National Insurance Company ("Ideal"). As noted in the Respondent's Brief of Defendant-Respondent Gem State

Mutual of Utah (now known as Gem Insurance Company and referred to hereafter as "Gem") at paragraph 1, and not disputed by Plaintiff-Appellant Thelma Johnson ("Mrs. Johnson"), Mrs. Johnson was paid a death benefit from Ideal in the amount of \$12,000.00.

Furthermore, Mrs. Johnson claims this is a case of first impression in Utah. This is not so. As cited by both Defendants in the Lower Court and on appeal to the Utah Court of Appeals, and as cited by the Utah Court of Appeals in their August 29, 1989 opinion, this Court reviewed a factually similar case, Kloepfer v. Continental Assurance Co., 23 Utah 2d 178, 460 P.2d 339 (1969). At that time, this Court found no ambiguity in the contested language of the group insurance policy and upheld the Lower Court's award in favor of the Defendant.

2. Plaintiff's claim that the Utah Court of Appeals wrongly applied the cited law to the facts of the case is not a sufficient articulation of a "question presented on appeal," as required under Rule 49(a)(4) of the Utah Rules of Appellate Procedure ("URAP").

**OBJECTION TO PLAINTIFF'S STATEMENT
OF THE FACTS-ADMITTED/UNCONTESTED FACTS.**

1. As she has throughout the Lower Court proceedings and the proceedings before the Utah Court of Appeals, Plaintiff continues to characterize the "open enrollment" period, during which the Utah State Retirement Office ("Retirement Office") allowed its employees to enroll (or not) in the new group life insurance program it was

offering them, as an "offer of insurance" from Gem to state employees. In fact, as is undisputed, Gem entered into a group life insurance contract with the Retirement Office. The employees of the Retirement Office were offered the opportunity to obtain life insurance benefits under Gem's plan, which would become effective July 16, 1978. The Retirement Office's former group life insurance plan was with Ideal, coverage for which was to terminate on July 15, 1978. Accordingly, Plaintiff's characterization throughout her "Admitted/Uncontested Facts" section of the "Blue Brochure" as an offer, and Plaintiff's decedent's filling out of the enrollment card attached to the Blue Brochure as an acceptance, is incorrect as a matter of law and undisputed fact.

2. As she has throughout the Lower Court proceedings and the proceedings before the Utah Court of Appeals, Plaintiff fails to acknowledge, or place before this Court, the undisputed evidence that the Retirement Office not only circulated the "Blue Brochure" but also the June 20, 1978 "Employees Group Insurance Bulletin," which stated in express terms that the effective date of the Gem group life insurance policy was July 16, 1978. Before the Lower Court, Gem provided undisputed evidence that the Retirement Office circulated such documents to their employees in their paycheck envelopes. At no time during the course of this litigation has the Plaintiff ever provided competent evidence that her decedent did not receive the June 20, 1978 bulletin.

3. At paragraph 13 of her "Admitted/Uncontested Facts," Plaintiff claims that the only information available to the Retirement Office's employees during the enrollment period (which ended on June 30, 1978) was the information in the Blue Brochure. This statement ignores the fact that all employees of the Retirement Office received the June 20, 1978 bulletin.

4. At paragraph 15 of her "Admitted/Uncontested Facts," Plaintiff claims that the effective date of Gem's coverage was admitted to be July 1, 1978. Plaintiff cites her Complaint and the Retirement Office's Answer for this misrepresentation of the record. In fact, Plaintiff filed a First Amended Complaint on or about March 21, 1985, in which her allegations of a contract of life insurance as of July 1, 1978 are included within paragraphs 15 through 17. Those paragraphs were flatly denied by both Gem in its March 28, 1985 Answer, and the Retirement Office in its April 9, 1985 Answer.

5. Plaintiff notes that she filed a timely death claim with the Retirement Office after the death of her husband. It is significant to note that this death claim (Exhibit 13 of Plaintiff's Petition) is on a "Proof of Death" claim for Ideal, showing Plaintiff's knowledge that her benefits under her decedent's group life insurance policy were with Ideal.

ARGUMENT

I. AS OF JULY 5, 1978, PLAINTIFF'S DECEDENT, DOUGLAS JOHNSON, HAD NO LIFE INSURANCE WITH GEM.

Plaintiff initiates her argument by claiming that this is a case of first impression. If one were to review every minor fact in each piece of litigation, every case would be a case of first impression. As noted by the Utah Court of Appeals in their opinion affirming the Lower Court's grant of summary judgment to Gem, there is a Utah Supreme Court case directly on point from 1969, Kloepfer v. Continental Assurance Co., 23 Utah 2d 178, 460 P.2d 339 (1969). That case concerned a group life insurance plan where a claim of ambiguity had been made by the Plaintiff with regard to the effect date of the policy. The decedent in that case died before receiving the policy or the letter noting the effective date of the policy. His spouse contended that he should have been covered from the moment he was accepted for insurance. The Kloepfer case could not be more similar factually to this case. The fact that in the instant case Plaintiff's decedent obtained life insurance on an open enrollment basis rather than with proof of insurability is irrelevant to the issues in this case.

Plaintiff mischaracterizes the rulings by the Lower Court and the Utah Court of Appeals as having implicitly rejected Gem's defenses (besides clarity of the express language in the Blue

Brochure and information bulletin) of statute of limitations, failure to make a claim as required under the policy language, and laches. In fact, the Lower Court and the Utah Court of Appeals did not need to get to those defenses because as a matter of law Plaintiff had failed to show any ambiguity in the language of the documents at issue, thus denying Plaintiff any claim against Gem, and setting the effective date of the policy as July 16, 1978, not July 1, 1978.

Plaintiff also mischaracterizes the state of the record before the Lower Court and the Utah Court of Appeals when she says that Gem and the Retirement Office failed to produce any evidence to show the existence of or the distribution of the June 20, 1978 information bulletin. The Lower Court had before it at the time of the hearing on the various parties' motions for summary judgment the Affidavits of Pat Myers, Linn J. Baker, Jo Anne Hollingsworth, Scott Hanson, and Clara Moss, as well as true and correct copies of the June 20, 1978 information bulletin and Gem's master policy with the Retirement Office, and Scott Hanson's deposition. The only evidence produced by Plaintiff in support of her claim that her decedent did not receive the June 20, 1978 information brochure is her Affidavit, in which she claims that her husband never received such an information bulletin, although she fails to testify to any facts showing her competence to know what her husband did or did not receive.

The issue of when Gem's life insurance policy was effective as to the decedent is the only one to be determined by the Lower Court or the Utah Court of Appeals. Plaintiff's argument is no different now than it was before the Lower Court or the Utah Court of Appeals. Accordingly, and within the context of Rule 46, URAP, there is no reason for this Court to grant a writ of certiorari.

II. THE UTAH COURT OF APPEALS CORRECTLY ANALYZED PRECEDENTIAL CASE LAW WITHIN THE CONTEXT OF THE UNDISPUTED FACTS OF THIS CASE.

Plaintiff argues that the Utah Court of Appeals wrongly relied upon the Kloepfer case, as well as the Davison v. Businessmen's Assurance Co., 85 N.M. 796, 518 P.2d 776 1974) case, in affirming the Lower Court's grant of summary judgment to the Defendants. Plaintiff claims that the case most relevant to the undisputed facts in this case is Gladden v. Paragas, Inc. of Waldorf, Md., 575 F.2d 1091 (D.N.C. 1978). The Kloepfer and Davison cases are directly on point with the issues in this case, which specifically have to do with ambiguity (or the lack of it) in an insurance contract. The Gladden case is immediately distinguishable from this case in that it concerned a contract between an employee and his employer, not an effective date of insurance to a certificate holder (a third-party beneficiary) under a group life insurance policy his employer had with a life insurance company. The Lower Court, as affirmed by the Utah Court

of Appeals, found the Kloepfer and Davison cases persuasive, and ruled against Plaintiff. Gem urges that this Court do the same and deny Plaintiff's Petition for Writ of Certiorari.

III. PLAINTIFF'S CLAIMS OF DENIAL OF
EQUAL PROTECTION AND ENTITLEMENT TO
INTEREST AND ATTORNEY'S FEES AS
CONSEQUENTIAL DAMAGES DUE TO GEM'S
ALLEGED BREACH OF POLICY ARE NOT AT
ISSUE.

The Lower Court and the Utah Court of Appeals did not reach these claims by Plaintiff because they determined at the outset that there was no ambiguity in the Blue Brochure or the June 20, 1978 information bulletin, thus setting the effective date of Gem's policy as July 16, 1978 and finding that Plaintiff had no claim against Gem. Plaintiff's arguments in her Petition for Writ of Certiorari are no different than the argument she made before the Lower Court and the Utah Court of Appeals, and accordingly her Petition for Writ of Certiorari should be denied on that basis.

IV. NO GENUINE ISSUE OF MATERIAL FACT
EXISTED BEFORE THE LOWER COURT.

The only evidence provided by the Plaintiff before the Lower Court in support of her claim that an issue of fact existed as to whether there was a distribution of the June 20, 1978 information bulletin was her claim that her husband never received it (with no supporting evidence as to how she would be competent to have that knowledge), and two Affidavits of employees of the American Fork

Training School and the Utah State Insurance Commissioner's Office. Those Affidavits are flawed on their face with regard to knowledge of the June 20, 1978 information bulletin - they provide no information regarding contemporaneous knowledge of whether or not they received such bulletin.

CONCLUSION

Plaintiff's various arguments in support of her Petition for Writ of Certiorari are no different than her arguments before the Lower Court and the Utah Court of Appeals. She has provided no new evidence before this Court, nor has she cited any new case law in support. Accordingly, she has made no argument under Rule 46 of the Utah Rules of Appellate Procedure as to why this Court should, in its judicial discretion, grant a Writ of Certiorari. Plaintiff has not indicated that the panel of the Utah Court of Appeals that denied this case rendered a decision in conflict with another panel of the Utah Court of Appeals on the same issue of law; she has not shown that the Utah Court of Appeals' opinion decided a question of state law in a way that is in conflict with any decisions of this Court; she has not shown that the Utah Court of Appeals' opinion is an extensive departure from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by the Lower Court; nor has she shown that the Utah

Court of Appeals has decided an important question of state law which has not been, but should be, settled by this Court.

The Plaintiff continues to make her tired and implausible argument that there was a contract between Plaintiff's decedent and Gem with regard to the effective date of Gem's group life insurance policy with the Retirement Office. No such contract existed. The contract for the life insurance policy was between Gem and the Retirement Office, and the documents before the Lower Court, the Utah Court of Appeals, and this Court clearly and unambiguously state that the effective date for that policy was July 16, 1978.

The extant case law supports the Utah Court of Appeals' affirmation of the Lower Court's grant of summary judgment to Gem. The case upon which Plaintiff relies to the contrary is easily distinguishable from the facts in this case.

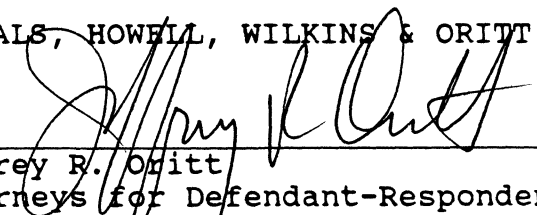
The alleged issues of denial of equal protection and interest and attorney's fees do not need to be reached, as the Plaintiff cannot prove the threshold claim of Gem's life insurance policy being effective as to Plaintiff's decedent prior to July 16, 1978.

Finally, Plaintiff provided no competent evidence before the Lower Court to raise a genuine issue of material fact with regard to the effective date of Gem's group life insurance policy with the Retirement Office.

For all of the above reasons, Gem respectfully requests this Court to deny Plaintiff's Petition for Writ of Certiorari.

DATED this 21st day of May, 1990.

TIBBALS, HOWELL, WILKINS & ORITT



Jeffrey R. Oritt
Attorneys for Defendant-Respondent
Gem State Mutual of Utah

MAILING CERTIFICATE

I hereby certify that I caused to be hand-delivered four (4) true and correct copies of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, this 21st day of May, 1990, to the following counsel of record:

Arron F. Jepson, Esq.
Attorney for Plaintiff-Appellant
Suite 608, Judge Building
8 East 300 South
Salt Lake City, Utah 84111

Mark A. Madsen, Esq.
Attorney for Defendant-Respondent
Utah State Retirement Board
540 East 200 South
Salt Lake City, Utah 84102

JOHNSON.APP